BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF OSTROM MUSHROOM FARMS, Appellant, v. OLYMPIC AIR POLLUTION CONTROL AUTHORITY, Respondent.	PCHB Nos. 81-15, 81-33, 81-43, 81-55, 81-57, 81-62 & 81-66 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters, the consolidated appeals from the assessment of nine $250 civil penalties for the alleged violation of Sections 9.11 and 9.23 of respondent's Regulation I, came before the Pollution Control Hearings Board, Nat W. Washington, Chairman, Gayle Rothrock, and David Akana (presiding), at a formal hearing in Lacey on June 5 and 11, 1981.

Respondent was represented by its attorney, Fred D. Gentry; appellant was represented by its attorney, G. Richard Hill. Court reporters Betty Koharski and Carolyn Koinzan recorded the proceedings.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

The Olympic Air Pollution Control Authority (hereinafter "respondent") is an agency formed pursuant to Chapter 70.94 RCW and has jurisdiction within the counties of Clallam, Grays Harbor, Jefferson, Mason, Pacific and Thurston.

II

Ostrom Mushroom Farms (hereinafter "appellant") is a grower and marketer of fresh and processed mushroom products. The entire operation is situated on 120 acres at 8323 Steilacoom Road SE, in Olympia, Washington. Mushrooms have been cultivated on portions of the site for some 50 years. The site is generally identified as "Mushroom Corner" on area maps.

The site is located west of a 20-unit trailer park, east of a school and ball park, and 500 feet south of Hawskridge, a residential subdivision.

Appellant's use of the site appears consistent with the applicable zoning laws.

III

Before the Hawksridge subdivision was created, it became apparent to appellant that the property located north of appellant's site would be subdivided. In 1977 appellant purchased as much of the surrounding property as it could afford, about 60 acres. Three months later on

August 4, 1977, about 40 acres was sold to R.D. and L.D. Thompson. The twenty remaining acres were reserved by appellant primarily as a buffer from surrounding activities.

As a part of its agreement with Thompsons, appellant attached certain covenants to the real estate purchase agreement. Thompsons and their successors recognized the existence of appellant's operation and took the property--waiving any opposition to the operation--and waiving claims for damages or injunctive actions. The covenants were to be "null and void" if the Thompsons' proposed subdivision was a "VA or FHA subdivision." There is no evidence that the covenants were recorded or, if recorded, effective rather than "null and void."

IV

On November 1, 1977, appellant wrote to the Thurston Regional Planning Council regarding the residential plat proposed by the Thompsons. Appellant did not object to the plat but did ask that prospective buyers be made aware of the farm and the likelihood of noticeable odors by residents in the development.

On November 21, 1977, the County approved the preliminary plat of the subdivision now known as Hawksridge. A condition of approval was that the developer make clear, in the disclosure form for the state and in the plat covenants, that the buyers be aware of appellant's composting operation and of the odor that will occur.

V

The mushroom growing process includes a composting phase. The materials currently used in the process are wetted wheat straw, dried

poultry waste, cottonseed meal, cottonseed hulls, and agricultural gypsum. The materials are combined and turned according to a schedule. Thereafter, the compost is pasteurized with steam. After cooling, the compost is innoculated with a mold of mushroom spores attached to wheat grain. The materials are then taken to an area where mushrooms are grown and harvested. After harvesting, the compost is pasteurized and removed.

VI

Any odor from the mushroom growing process likely comes from the composting phase of the operation. Composting is conducted on a large concrete slab located about 500 feet from the Hawksridge subdivision. Materials may be located either undercover or in the open, depending on the state of the composting. Likely specific odor sources include the slab dip tank (where straw is wetted), the large mounds of composting wetted straw stored in the open area, and the combined composting materials ricked under a roofed area.

Appellant categorizes odors from the composting process as either a "barnyard" odor or a "malodor." Barnyard odor is further described as the inevitable odor associated with the aerobic decomposition of organic materials. It can be strong but is less objectionable odor than "malodor". Even with proper management practices a "barnyard smell" will remain, but this odor, except under unusual circumstances, would not violate chapter 70.94 RCW or Regulation I. "Malodor" is a sour, penetrating odor associated with an anaerobic condition within the compost. It is associated with decomposing straw and standing

pools of liquid on the ground. The presence of a "malodor" in the compost signals an inferior composting material and the likelihood of lower crop yields. Such odor is avoidable by proper management of the composting materials. The odor associated with the standing pools of liquid can be eliminated by proper water runoff management.

VII

In July, 1980, in response to several complaints about odor, respondent's inspector visited complainants' and appellant's site. Odors were determined to come from appellant's operations. Appellant was advised of the complaints and results of the investigation but no notice of violation, citation or civil penalty was issued for the observations.

VIII

In July, 1980, appellant, respondent and some residents of Hawksridge met. Appellant explained the process and procedures of the operation and answered questions. Respondent developed an outline of steps to be taken by appellant as a part of a voluntary compliance program to find a solution to the odor problem. Although the correspondence from appellant showed cooperation, respondent doubted the effectiveness of the steps outlined by appellant. The voluntary program continued until January 16, 1981, when appellant was issued a notice of violation as a warning that enforcement action would begin for future odor violations.

IX

Commencing on January 26, 1981, and on February 17, 24, March 3, 25, April 9, 21 and May 1, respondent's inspector visited appellant's

site in response to complaints of odor. On each occasion appellant's operation was emitting the odor in question. The odor was variously described by the many complainants as smells from an "open sewer", "decayed fish", "decayed body", "not pleasant", "putrid", and/or "long lasting" on the days in question. Appellant acknowledges the existence of odors but disputes that the odor is as bad as described. However, appellant's own odor survey beginning in February, 1981, confirms the presence of at least a "sour" or "penetrating" unpleasant odor on February 17, 24, and March 25. The odor was described as much stronger on March 3, April 9 and 21. Evidence of odor on May 1 was conflicting and was not sufficient to establish a violation. Respondent presented no evidence of any odor on May 7, 1981.

X

The smell on the dates and times alleged was of such character and duration that the residents affected curtailed their outside activities such as barbeques, yardwork, picnics, entertaining and gardening. Children were confined indoors. Many friends of complainants are either not invited or will not come if invited because of the odor. Some complainants who do have guests fear that the smell will interfere with their entertaining, and are embarassed and humiliated when an odor is present.

Some complainants attribute nausea, allergies, dizziness, eye irritations, and asthmatic symptoms to the presence of the odor.

The complainants testified that they either had no actual knowledge of the existence of the mushroom farm or were unaware that unpleasant odors were associated with the nearby farm.

As a result of the complaints and the verification of odor and its source, a notice of violation was timely given to appellant for each instance which notified appellant of the alleged violation. After considering appellant's record, practices and the amount of penalty authorized, respondent determined that a $250 penalty for each of the nine events was reasonable and proper. Appellant appealed the decisions to this Board.

XI

Appellant and its expert witness acknowledge that more can be done in the composting area to reduce odor. Along this topic, appellant proposes to install a chemical misting system to mask odors, improve the slab and dip tank, add grape pomace to the compost as an odor retardent, and improve communications with its neighbors. The expert witness suggests a sweetner added to the compost, compost pile aeration, control of water runoff and attention to good management. It is apparent that appellant did not reach its own goal of good agricultural practices with respect to odor control. Appellant's economic position has prevented, and may continue to prevent, the starting and completion of some of its proposed odor control measures.

XII

Pursuant to RCW 43.21B.260, respondent has filed with this Board a certified copy of its Regulation I which is noticed.

XII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

II

Section 9.11 of Regulation I provides for the installation and use of odor control measures:

> (a) Effective control apparatus, measures, or process shall be installed and operated to reduce odor-bearing gases or particulate matter emitted into the atmosphere to a minimum, or, so as not to create air pollution.
>
> (b) The Board may establish requirements that the building or equipment be closed and ventilated in such a way that all the air, gases and particulate matter are effectively treated for removal or destruction of odorous matter or other air contaminants before emission to the outdoor atmosphere.
>
> (c) No person shall cause or allow the emission or generation of any odor from any source which unreasonably interferes with another person's use and enjoyment of his property.

Section 9.23 of Regulation I provides:

> (a) No person shall cause or allow the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety, or welfare of any person, or causes damage to property or business.

"Air contaminant" is "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof." Section 1.07; RCW 70.94.030(1). "Emission" is the "release into the

outdoor atmosphere of air contaminants." Section 1.07; RCW 70.94.030(8). Air Pollution is defined as:

> . . . presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. Section 1.07. RCW 70.94.030(2).

Sections 9.11(c) and 9.23(a) thus make "air pollution" unlawful. Therefore, when an odor is present in the outdoor atmosphere in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property, Sections 9.11(c) and 9.23(a) are violated. In interpreting Sections 9.11(a) and 9.23(a), the fundamental inquiry is not whether the use to which property is put is reasonable or unreasonable, but whether air pollution is of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. In the instant cases, respondent did not prove injury to human health, plant or animal life, or property. In determining whether the air pollution unreasonably interferes with enjoyment of life and property, we note that the precise degree of discomfort and annoyance experienced cannot be definitely stated. Suffice it to say that complainants should be persons of ordinary and

normal sensibilities.[1] Respondent must prove its case by a preponderance of the evidence. In weighing such evidence, we conclude that odor from appellant's facilities on January 26, February 17, 24, March 3, 25, April 9, and 21, 1981, produced an unreasonable and substantial discomfort and annoyance to persons of ordinary and normal sensibilities.

Appellant can reduce its odor by using good agricultural practices. It recognizes that further steps can be taken, and proposes to take such steps. However, the economic burden placed on appellant to take the proposed steps to reduce its odor is not relevant to whether a violation occurred. Such burden would be relevant in an application for a variance under Section 3.23 of Regulation I and addressed to the discretion of respondent's Board of Directors.

Respondent did not show, by a preponderance of the evidence, that appellant caused or allowed the emission of an odor of such characteristics and duration as would violate either Section 9.11(c) or Section 9.23(a) of Regulation I on May 1 and 7, 1981.

III

The $250 civil penalties assessed pursuant to Section 3.27 for the events on January 26, February 17, 24, March 3, 25, April 9, and 21,

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1. "Where the invasion affects the physical condition of the plaintiff's land, the substantial character of the interference is seldom in doubt. But where it involves mere personal discomfort or annoyance, some other standard must obviously be adopted than the personal tastes, susceptibilities and idiosyncracies of the particular plaintiff. The standard must necessarily be that of

1981 are reasonable in amount; appellant does not contend otherwise. However, payment of the civil penalties should be tailored to accomplish the purposes of the Washington Clean Air Act as declared in RCW 70.94.011[2] and not to compensate complainants. The mushroom farms's contribution to the economic development of the state should be promoted consistent with the comfort and convenience of the state's inhabitants.[3] As demonstrated by this case, these considerations are in tension. It is unfortunate that the complainants' properties were those sold by appellant for subdividing, for appellant has sowed the seeds of its present difficulties with its neighbors. However,

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1. Cont.

> definite offensiveness, inconvenience or annoyance to the normal person in the community--the nuisance must affect 'the ordinary comfort of human existence as understood by the American people in their present state of enlightenment.'" Prosser, Law of Torts (1971), p. 758 (citations omitted).

2. RCW 70.94.011 provides in part:

> It is declared to be the public policy of the state to secure and maintain such levels of air quality as will protect human health and safety and comply with the requirements of the federal clean air act, and, to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of its inhabitants, promote the ecomonic and social development of the state, and facilitate the enjoyment of the natural attractions of the state...

3. Executive Order EO 80-01 (January 4, 1980) cited by appellant, declares a policy to preserve farmland preservation with respect to environmental and land use permits, among other things. This order applies to permits rather than enforcement action. More in point is ESHB 252 exempting odors caused by agricultural activities under certain conditions. However, the instant enforcement actions predate the effective date of the Act.

appellant can take steps to lessen the impact of its operation on its neighbors. These steps, and perhaps others, can best be done under the terms of variance. Of the seven $250 civil penalties, $1000 of the $1750 total should be payable. The remaining amount should be suspended on condition that appellant apply for and diligently pursue a variance from Sections 9.11 and 9.23 of Regulation I.

IV

The $250 civil penalties issued for the alleged events on May 1 and 7, 1981 should be stricken.

V

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Findings the Board enters this

ORDER

1. The seven $250 civil penalties for the violation of Regulation I on January 26, February 17, 24, March 3, 25, April 9, 21, and May 5, 1981, totalling $1750 are affirmed, provided that payment of $750 of the civil penalties is suspended on condition that appellant Ostrom Mushroom Farms immediately apply for and diligently pursue a variance from the appropriate sections of Regulation I.

2. The two $250 civil penalties for the alleged violation of Regulation I on May 1 and 7, 1981, are stricken.

DONE this 16th day of July, 1981.

POLLUTION CONTROL HEARINGS BOARD

NAT W. WASHINGTON, Chairman

DAVID AKANA, Member

GAYLE ROTHROCK, Member